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Internationalizing the North American Agreement on Labor Cooperation

Juli Stensland

Worker rights¹ is an increasingly prominent issue in international trade negotiations and agreements.² The issue has been especially evident in recent actions by the United States. During the 1980s, the U.S. Congress added worker rights provisions to four pieces of trade-related legislation: the Generalized System of Preferences (GSP),³ the Overseas Private Investment Corporation Act (OPIC),⁴ the Caribbean Basin Economic Recovery Act (CBERA),⁵ and Section 301 of the Trade Act of 1974⁶ as

1. This Note uses the term worker rights as defined by U.S. trade legislation which includes: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of any form of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. See *infra* notes 80-84 and accompanying text.

2. See David R. Sands, *Trade Negotiators Have a Full Plate; 'Kitchen Sinkers' Pile on Side Issues*, WASH. TIMES, June 13, 1993, at A12. "Trade has become an arena in which all kinds of other issues—the environment, food safety, labor conditions—get hashed out." *Id.* (quoting Alan C. Raul, former general counsel in the U.S. Department of Agriculture).

3. The Generalized System of Preferences is part of the Trade Act of 1974, Pub. L. No. 93-618, tit. V., §§ 501-05, 88 Stat. 2066 (1975) (codified as amended in 19 U.S.C. §§ 2461-66 (1988)) [hereinafter GSP]. The GSP program grants trade benefits to designated developing countries. See *infra* notes 74-90 and accompanying text, for further description of the GSP.

4. The Foreign Assistance Act of 1961 created the Overseas Private Investment Corporation. Foreign Assistance Act of 1961, Pub. L. No. 87-195, pt. I, ch. 2, tit. IV., § 231, as added Dec. 30, 1969, Pub. L. No. 91-175, pt. I, § 105, 83 Stat. 809 (codified as amended at 22 U.S.C. § 2191 (1988)) [hereinafter OPIC]. OPIC is a federally chartered and operated corporation designed to promote economic growth in developing countries by supporting U.S. private investment in such countries mainly by providing investment insurance. *Id.* The Overseas Private Investment Corporation Amendments Act of 1985 requires OPIC to withhold assistance for projects in countries that fail to take steps to adopt laws that extend internationally recognized worker rights. Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, § 5, 99 Stat. 1670 (codified as amended at 22 U.S.C. § 2191a(a)(1) (1988)).

5. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, subtit. A, §§ 201-18, 97 Stat. 384 (1983) (codified as amended at 19 U.S.C. §§ 2701-06 (1988)) [hereinafter CBERA]. CBERA is designed to promote economic revitalization and expand private sector opportunities in the Caribbean Basin region by permitting the president to grant duty-free treatment to certain

amended by the Omnibus Trade and Competitiveness Act of 1988 (OTCA).⁷ The increased attention to worker rights has continued in the 1990s. For example, the Worker Rights and Labor Standards Trade Act of 1994⁸ and the Fair International Standards in Trade Act of 1994⁹ were both pending in 1994.

During the recent debate over the North American Free Trade Agreement (NAFTA),¹⁰ the call for an agreement that acknowledged worker rights¹¹ resulted in a side agreement, enti-

products from beneficiary developing countries. It also connects trade benefits to worker rights. *Id.* § 2702(b)(7) (Supp. II 1990).

6. Trade Act of 1974, Pub. L. No. 93-618, tit. III, ch. 1, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411 (1988)).

7. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. I, subtit. C, pt. 1, § 1301(a), 102 Stat. 1164 (codified as amended at 19 U.S.C. § 2411 (1988)) (amending Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1984)) [hereinafter OTCA]. The OTCA amends Section 301 of the Trade Act of 1974, by expressly designating the denial of worker rights, as defined by the five ILO conventions, as an unreasonable trade practice. *Id.* § 2411(d)(3)(A). Section 301 authorizes the United States to respond unilaterally to the denial of labor rights as an unfair trade practice with measures that include trade sanctions. *Id.* § 2411(a)(1), (b)(2).

8. S. 2268, 103rd Cong., 2d Sess. (1994). This legislation directs the president to seek the establishment of a working party within the General Agreement on Tariffs and Trade (GATT) to examine the relationship of fundamental internationally-recognized worker rights to specified articles of the GATT. *Id.*

9. H.R. 4710, 103rd Cong., 2d Sess. (1994). This legislation requires the inclusion of worker rights provisions and environmental standards in any trade agreement entered into under any future trade negotiating authority. *Id.*

10. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 and 32 I.L.M. 605 [hereinafter NAFTA]. NAFTA creates a free trade zone among the United States, Mexico and Canada. *See generally What is Nafta?*, WALL ST. J., Sept. 15, 1993, at A16 (describing the major elements of NAFTA).

11. *See, e.g., Labor: Reich Floats Idea of NAFTA Secretariat to Investigate Alleged Labor Violations*, 10 Int'l Trade Rep. (BNA) 740 (May 5, 1993). The debate over NAFTA attracted various participants. Labor groups opposed NAFTA and argued that American jobs would be transferred to Mexico where labor costs are considerably lower. *Field Hearings on H.R. 3878, The American Jobs Protection Act, and on the Mexico Free Trade Agreement and its Impact on American Jobs and the American Workplace*, 102d Cong., 2d Sess. 100 (1992) (statement of Donald W. Riegle, senator from Michigan); *Nafta Opponents Blast Side Pacts; Call Deal "Same Bad Bush NAFTA,"* 10 Int'l Trade Rep. (BNA) 1366 (Aug. 18, 1993).

In April 1993, Labor Secretary Robert Reich announced that NAFTA would benefit U.S. workers if labor side agreements were added. *Id.*; *see* Thomas R. Howard, *Free Trade Between the United States and Mexico: Minimizing the Adverse Effects on American Workers*, 18 WM. MITCHELL L. REV. 507 (1992) (comparing the advantages of a bilateral agreement on labor between the United States and Mexico with the disadvantages of unilateral action). For a discussion of the reasons behind worker rights provisions, *see infra* notes 19-26 and accompanying text.

tled the North American Agreement on Labor Cooperation ("Labor Side Agreement").¹² The goal of the Labor Side Agreement is to improve labor conditions and promote the enforcement of national labor laws in the United States, Mexico and Canada.¹³

This Note examines previous attempts to link labor standards to trade benefits and focuses on the Labor Side Agreement as a new development in the regulation of worker rights. Part I explores the motivating forces behind worker rights provisions. Part II addresses the role of the International Labor Organization (ILO)¹⁴ and the General Agreement on Tariffs and Trade (GATT)¹⁵ in the regulation of international worker rights. Part III analyzes U.S. unilateral attempts to tie worker rights to international trade by assessing the effectiveness and identifying the weaknesses of such unilateral action. Part IV evaluates the NAFTA side agreement on labor cooperation as the most recent trade legislation addressing worker rights. This Note concludes that the Labor Side Agreement represents a promising approach

12. North American Agreement on Labor Cooperation, Dec. 17, 1992, U.S.-Mex.-Can., Pub. L. No. 103-182, 107 Stat. 2057, *reprinted in* 32 I.L.M. 1499 (1993) [hereinafter Labor Side Agreement]. Labor groups' criticism of NAFTA extended to the Labor Side Agreement. Groups, such as the AFL-CIO, faulted the side agreement for benefiting only corporate concerns at the expense of worker interests. *Unions Vow to Defeat NAFTA Supporters; Business Groups Cautiously Optimistic*, 10 Int'l Trade Rep. (BNA) 1387 (Aug. 18, 1993).

13. Labor Side Agreement, *supra* note 12, art. 1.

14. The ILO defines basic labor rights through internationally ratified conventions. The United States has signed eleven ILO conventions—seven of which were signed prior to 1947, and most of these conventions concern the labor rights of seafarers. *See Lists of Ratification by Convention and by Country* (as of December 31, 1993), Int'l. Lab. Conf., 81st Sess., Report III (Part 5), ILO, Geneva 268 (1994). The other four conventions are ILO Convention No. 105, Abolition of Forced Labour Convention (1957), *Id.* at 140-41; ILO Convention No. 144, Tripartite Consultation (International Labour Standards) Convention (1976), *Id.* at 188; ILO Convention No. 147, Merchant Shipping (Minimum Standards) Convention (1976), *Id.* at 191; and ILO Convention No. 160, Labour Statistics Convention (1985), *Id.* at 205. The U.S. Congress has incorporated five ILO conventions as internationally recognized worker rights in recent legislation. *See infra* notes 80-84 and accompanying text.

15. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. XX, 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The World Trade Organization (WTO) is targeted to supersede the General Agreement on Tariffs and Trade as the arbiter of world trade in 1995. *Reich Calls for Guidelines on World Trade-Labor Practices*, 11 Int'l Trade Rep. (BNA) 941 (June 15, 1994). "The United States has pushed for the WTO discussions [on worker rights], but developing countries still resist the debate, which they view as heavily burdened with protectionist risks." *Commission Meeting to Consider WTO Talks on Labor Standards*, 11 Int'l Trade Rep. (BNA) 476 (Mar. 23, 1994).

to effectively link worker rights and trade benefits on a multilateral level.

I. THE MOVEMENT TO LINK INTERNATIONAL TRADE AND WORKER RIGHTS

Since the early 1800s, industrialized nations have pursued a connection between labor standards and international trade.¹⁶ The proposals for international labor legislation especially grew as industrialization spread during the second half of the nineteenth century. The push for an international forum to address labor standards finally culminated in the 1919 Treaty of Versailles,¹⁷ which contains the Constitution of the ILO.¹⁸

The forces leading to the formation of the ILO and which continue to drive the movement for worker rights are a product of mixed motives. First, certain parties with "altruistic" motives support worker rights efforts. Some such proponents argue that the development of humane working conditions is a proper foreign policy objective considering that in some countries labor leaders are persecuted or killed,¹⁹ and workers are being severely exploited, especially through prison and child labor.²⁰ Other such proponents seek to funnel the economic benefits of trade agreements to the worker and ultimately raise the worker's standard of living.²¹ Neither group, however, seeks to raise wages and working conditions to the level found in developed countries.²² Instead, altruistic proponents believe that international labor standards will ultimately empower workers with the ability to influence their own work standards and conditions.²³

16. For a discussion of the early pioneers of international labor legislation, see GÖTE HANSSON, *SOCIAL CLAUSES AND INTERNATIONAL TRADE* 11 (1983).

17. Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, pt. XIII, 225 Consol. T.S. 188, 195.

18. HANSSON, *supra* note 16, at 19.

19. Steve Charnovitz states that "[t]he torture or murder of labor leaders is the ultimate deprivation of worker rights." Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61, 67 (1986).

20. *Id.* at 68. "The denial of labor rights in Third World countries tends to perpetuate poverty, to limit the benefits of economic development and growth to privileged elites, and to induce social instability and political rebellion." Don J. Pease & J. William Goold, *The New GSP: Fair Trade with the Third World?*, 2 WORLD POL'Y J. 351, 358 (1985).

21. Steve Charnovitz, *Caribbean Basin Initiative: Setting Labor Standards*, MONTHLY LAB. REV., Nov. 1991, at 54, 54.

22. FAYE LYLE, U.S. DEP'T OF LABOR, BUREAU OF LABOR AFFAIRS, *WORKER RIGHTS IN U.S. POLICY* 7 (1991).

23. *Id.*

Second, economic self-interest continues to fuel the movement for tying trade benefits to labor standards. Advocates claim such provisions are necessary to mitigate the economic advantages gained by trading partners who deny basic rights to workers.²⁴ By denying worker rights, such as collective bargaining and safe working conditions, competitors are able to lower production costs and prices accordingly. Advocates claim that ultimately such actions make the allocation of production across countries less responsive to factors such as the productive characteristics of labor.²⁵ The suppression of labor rights thus interferes with the beneficial properties of comparative advantage.²⁶

II. PAST MULTILATERAL ATTEMPTS TO LINK WORKER RIGHTS AND TRADE: THE ILO AND GATT

Socially and economically interested groups have exerted increasing pressure to promote international worker rights. Historically, attempts to address labor issues were made in prominent and developed multilateral forums, such as the ILO and the GATT. Unfortunately, both the ILO and GATT appear to be only partially equipped to multilaterally enforce worker rights.

A. THE ILO

Founded in 1919, the ILO is a specialized agency within the United Nations system responsible for labor and social issues. The founders of the ILO explicitly recognized the relationship between labor standards and international trade.²⁷ The Preamble of the ILO Constitution warns that "[t]he failure of any na-

24. *Id.* at i. One proponent states that laws which make trade conditional upon governments' observance of worker rights "are intended to discourage the pursuit of economic advantages that may be gained by achieving lower labor costs through denial of basic worker rights. They may also serve to ensure that the gains from trade are broadly distributed in national economies." *Id.* at 7.

25. Peter Dorman, *Worker Rights and International Trade: A Case for Intervention*, 20 REV. RADICAL POL. ECON. 241, 243-44 (1988). Dorman writes that "[i]n principle, tariffs which exactly offset the unit labor cost differentials attributable to variations in worker rights would be required to restore the efficiency properties of trade." *Id.* at 244.

26. Comparative advantage is an economic doctrine first developed by David Ricardo in 1817. See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, ch. VII (J.M. Dent & Sons Ltd. 1965) (1817). The doctrine states that whenever countries have relative production strengths, those countries will benefit from trade with each other if each country specializes in the production of the good in which the country has a relative or comparative advantage. *Id.* at 77.

27. HANSSON, *supra* note 16, at 20.

tion to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."²⁸ As part of its mission, the ILO addresses issues including the right to work, social security, safe working conditions and the right to an adequate standard of living.²⁹

The ILO system of standards have been developed through a series of conventions³⁰ which ILO members have the option of ratifying.³¹ The number of ratifying countries to an ILO convention ranges from 1³² to 135.³³ Members are under no obligation to implement conventions which they have not ratified.³⁴ In addition, ILO members' right to file a complaint is granted only if a country believes that another member is not complying with a convention that both have ratified.³⁵ Specifically, Article 26(4) of the ILO Constitution authorizes the Governing Body to initiate the complaints procedure "either of its own motion or on receipt of a complaint from a delegate to the Conference."³⁶ Since 1980, numerous complaints have been filed³⁷ including claims against Sweden,³⁸ Poland,³⁹ South Africa,⁴⁰ Romania,⁴¹ Libyan

28. ILO CONST. pmb1.

29. ILO CONST. Annex III.

30. As of December 1993, there were 173 ILO conventions in existence. See *Lists of Ratification by Convention and by Country*, *supra* note 14.

31. JAMES AVERY JOYCE, *WORLD LABOUR RIGHTS AND THEIR PROTECTION* 26 (1980).

32. ILO Convention No. 76, *Wages, Hours of Work and Manning (Sea) Convention* (1946), *Lists of Ratification by Convention and by Country*, *supra* note 14, at 99. Australia is the only signatory to this convention. *Id.*

33. ILO Convention No. 29, *Forced Labour Convention* (1930), *Lists of Ratification by Convention and by Country*, *supra* note 14, at 47-49.

34. JOYCE, *supra* note 31, at 26.

35. HANSSON, *supra* note 16, at 21. Article 26(1) of the ILO Constitution grants a right to any Member "to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified." ILO CONST. art. 26, cl. 1.

36. ILO CONST. art. 26, cl. 4.

37. For further discussion of past complaints with the ILO and the surrounding process, see E. OSIEKE, *CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION* 221-36 (1985).

38. 75 INT'L LABOUR OFFICE, *OFFICIAL BULLETIN* 6 (1992).

39. This claim was referred to a Commission of Inquiry. 66 INT'L LABOUR OFFICE, *OFFICIAL BULLETIN* 135 (1983). For a description of the Commission of Inquiry and its operating procedures, see OSIEKE, *supra* note 37, at 221-36.

40. 71 INT'L LABOUR OFFICE, *OFFICIAL BULLETIN* 153 (1988).

41. 72 INT'L LABOUR OFFICE, *OFFICIAL BULLETIN* 104 (1989). This claim was referred to a Commission of Inquiry. 73 INT'L LABOUR OFFICE, *OFFICIAL BULLETIN* 4 (1990).

Arab Jamahiriya,⁴² Panama,⁴³ Nicaragua,⁴⁴ the Dominican Republic and Haiti.⁴⁵

The Governing Body of the ILO can respond to a complaint by designating a Commission of Inquiry to investigate the complaint and compile a report on the matter.⁴⁶ If a government objects to the recommendations of the report, the government can refer the matter to the International Court of Justice,⁴⁷ whose decision is final.⁴⁸

Although the ILO is an effective standards-setting body, its ability to enforce labor standards is limited. First, a member is under no obligation to implement a convention which it has not ratified.⁴⁹ The large number of ILO conventions with a small number of signatories thus limits the application of labor standards on a worldwide basis. In addition, although the ILO monitors compliance of the conventions, the complaint process is not designed to apply economic sanctions.⁵⁰ There is only an understanding that ratifying countries will comply.⁵¹ The ILO thus relies primarily on moral and political pressure to promote worker rights.⁵²

42. 69 INT'L LABOUR OFFICE, OFFICIAL BULLETIN 135 (1986).

43. 66 INT'L LABOUR OFFICE, OFFICIAL BULLETIN 123 (1983).

44. This complaint was eventually referred to a Commission of Inquiry. 73 INT'L LABOUR OFFICE, OFFICIAL BULLETIN 6 (1990).

45. These matters were eventually referred to a Commission of Inquiry. 65 INT'L LABOUR OFFICE, OFFICIAL BULLETIN 101 (1982).

46. ILO CONST. art. 26, cl. 3.

47. ILO CONST. art. 29, cl. 2. The International Court of Justice is designed as an international court to settle legal disputes between states. Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1031, 1060, 3 Bevans 1153, 1186. Only states may be parties in cases before the court. *Id.* art. 34, 59 Stat. at 1059, 3 Bevans at 1186. The court consists of 15 judges qualified to hold the highest judicial office in their own countries or recognized as experts in international law. *Id.* art. 2, 59 Stat. at 1055, 3 Bevans at 1179. The General Assembly and the Security Council proceed independently to elect the members of the court. *Id.* art. 8, 59 Stat. at 1056, 3 Bevans at 1180. All member states of the United Nations are automatically parties to the Statute of the International Court of Justice. *Id.* art. 35, 59 Stat. at 1059-60, 3 Bevans at 1186. States that are not members of the United Nations may become parties to the Statute of the International Court of Justice. *Id.*

48. ILO CONST. art. 31.

49. OSIEKE, *supra* note 37, at 221.

50. *Id.* at 235.

51. LYLE, *supra* note 22, at 2.

52. *Id.* Lance Compa states that "the moral force of the ILO in the world community can bring reforms through public embarrassment of a violator." Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165, 179 (1993).

Due to the lack of a strong enforcement mechanism, the ILO remains a standards-setting body focused on improving international working conditions.⁵³ The standard-setting function of the ILO should not, however, be dismissed. The development of broad-based international standards is important in efforts to improve global working conditions. The United States, for example, relies on ILO conventions, including conventions that the United States itself has not ratified, to develop labor standards to which U.S. trade benefits are linked.⁵⁴ The weaknesses of the ILO nevertheless have turned efforts to reach international agreement on worker rights toward the GATT.

B. THE GATT

Although the GATT is the primary instrument of international trade regulation, the GATT has just one provision connecting fair labor standards to trade benefits.⁵⁵ GATT Article XX(e) allows a member country to restrict the importation of products produced by prison labor.⁵⁶ Since no other exceptions to the general free trade policies of the GATT are allowed for labor standards, countries are prohibited from restricting imports based on other worker rights criteria.

Recently, there has been a movement to insert a "social clause" into the GATT to permit countries to restrict imports where basic worker rights have been violated.⁵⁷ At the Preparatory Committee meeting of the GATT in June 1986, the United States requested that other contracting parties consider addressing worker rights in the GATT.⁵⁸ Despite those efforts, the introduction of a social or labor clause into the GATT has been strongly opposed.⁵⁹ The issue of international labor standards

53. JOYCE, *supra* note 31, at 32.

54. See *infra* notes 79-85 and accompanying text. European Commissioner for External Economic Affairs Sir Leon Brittan disagrees with the U.S. push for international labor standards. *Brittan Warns of Protectionist Risk in Mixing Trade with Labor, Environment*, 11 Int'l Trade Rep. (BNA) 92 (Jan. 19, 1994). Brittan believes that the responsibility for setting international labor standards rests with the ILO and its conventions—"many of which the United States has strangely not ratified." *Id.* Brittan sees the idea of asking developing countries to apply a U.S. labor standard as "unreasonable" and asks whether the idea is simply "a disguised form of protectionism." *Id.*

55. GATT, *supra* note 15, art. XX(e).

56. *Id.*

57. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L LAB. REV. 565, 565 (1987).

58. *Id.* (citing GATT doc. PREP.COM(86) W/43, June 25, 1986).

59. *Id.*

was discussed again in the World Trade Organization⁶⁰ Preparatory Committee but to no avail.⁶¹

Developing countries have been the most staunch opponents to adding a worker rights provision to the GATT. Developing countries are especially reluctant to allow developed countries to set global labor standards which they perceive to be dominated by protectionist motives.⁶² They view labor regulation as a device aimed at nullifying their primary advantage—low cost labor.⁶³ Developing countries are also wary that the imposition of international labor standards may infringe on their national sovereignty.⁶⁴ If worker rights were to enter a multilateral forum, such as the GATT, developing countries fear that they would eventually lose the power to set their own domestic labor standards. For example, a few developed countries could dominate negotiations, resulting in labor standards that would not accurately reflect working conditions on a global scale. A regulation which may be effective in benefiting U.S. workers may be inapplicable or even detrimental to workers in a developing country because of economic, sociological, and cultural differences.⁶⁵ These concerns have led to a stalemate in the process to enact a labor clause as part of the GATT.

III. U.S. UNILATERAL ATTEMPTS TO LINK WORKER RIGHTS AND TRADE: EFFECTIVENESS, WEAKNESSES, AND LEGALITY

The absence of a labor clause in the GATT and the difficulty of enforcing ILO labor standards have provided an impetus for the United States to unilaterally link worker rights to trade benefits. At the 1987 conference of the ILO, then-U.S. Labor Secretary William Brock warned that there was a danger of U.S.

60. The World Trade Organization is expected to supersede the GATT in 1995. *Reich Calls for Guidelines on World Trade-Labor Practices*, *supra* note 15.

61. *Id.* The United States initiated the discussion of international labor standards at the April Marrakesh Conference for the World Trade Organization (WTO) Preparatory Committee. *Id.* U.S. Labor Secretary Robert Reich also raised the issue at the ILO annual conference on June 9, 1994. *Id.*

62. R. Niels Marquardt, *Why Worker Rights?*, 65 *FOREIGN SERVICE J.* 25, 25 (1988).

63. Charnovitz, *supra* note 57, at 565.

64. Marquardt, *supra* note 62, at 25.

65. See James P. Kelleher, *The Child Labor Deterrence Act: American Unilateralism and the GATT*, 3 *MINN. J. GLOBAL TRADE* 161, 181 (1994) (discussing how concepts of roles for family members vary widely across cultures making it problematic to establish a norm based on a particular concept of family).

unilateral action on worker rights and trade unless the subject could be addressed in an international forum.⁶⁶ Brock stated that the United States had been blocked from having worker rights discussed in the early stages of the Uruguay Round,⁶⁷ and had fared no better in the ILO. At the ILO assembly, Brock remarked:

When we have raised the issue in the ILO, we have been told: that is a GATT issue [I]f we cannot discuss worker rights in the ILO and we cannot discuss it in GATT, no one should be terribly surprised to see unilateral efforts to encourage respect for worker rights.⁶⁸

Frustrated with their inability to promote worker rights in a multilateral context, the United States has acted unilaterally. Recent U.S. trade-related legislation that contains worker rights provisions include: GSP,⁶⁹ OPIC,⁷⁰ CBERA,⁷¹ and Section 301 of the Trade Act of 1974 as amended by the OTCA.⁷² GSP determinations provide the best example of U.S. unilateral action in the area of worker rights considering the influence that GSP determinations have had on similar CBERA and OPIC decisions.⁷³

66. *U.S. Proposal to Bring Worker Rights Issues Up at GATT Council Draws Cautious Response*, 4 Int'l Trade Rep. (BNA) 942 (July 22, 1987).

67. The Uruguay Round agreement was concluded in December 1993 after more than seven years of negotiations under the GATT. *Trade Negotiations Turn Eastward*, 11 Int'l Trade Rep. (BNA) 102 (Jan. 19, 1994).

68. *U.S. Proposal to Bring Worker Rights Issues Up at GATT Council Draws Cautious Response*, *supra* note 66.

69. 19 U.S.C. §§ 2461-66. See *infra* notes 74-90 and accompanying text for further description of the GSP.

70. 22 U.S.C. § 2191.

71. 19 U.S.C. §§ 2701-06.

72. 19 U.S.C. § 2411. The Multilateral Investment Guarantee Agency (MIGA) Act also contains a worker rights provision. MIGA Enabling Statute, Pub. L. No. 100-202, § 101(e), tit. I, 101 Stat. 1329-131, 1329-134 (1987) (codified as amended in 22 U.S.C. §§ 290k to 209k-11 (1988)). As an affiliate of the World Bank, MIGA provides guarantees to foreign investors against losses caused by non-commercial risks. *World Bank Investment Promotion Agency to Guarantee 10 Projects This Year*, 7 Int'l Trade Rep. (BNA) 1376 (Sept. 12, 1990). The MIGA Act contains a worker rights provision, but lacks the specific focus and the practical enforceability of the other provisions. The Act requires the U.S. Director to oppose the issuance of guarantees to countries that have not afforded internationally recognized worker rights; however, the Act provides that other member countries may disagree with the U.S. Director's actions. 22 U.S.C. §§ 290k-2, 290k-3. Therefore, the MIGA Act does not operate with the same unilateral force as the other provisions and in practice only serves to identify worker rights violations.

73. Of the U.S. trade laws requiring compliance with internationally recognized worker rights, the "most effective has been the Generalized System of Preferences Act (GSP)." Terry Coilingsworth et al., *Time for a Global New Deal*, FOREIGN AFFAIRS, Jan.-Feb. 1994, at 8, 12. See LYLE, *supra* note 22, at 10, 14.

A. GSP

The GSP program grants nonreciprocal duty-free tariff treatment to the vast majority of exports from designated "beneficiary developing countries."⁷⁴ In determining whether to designate a developing country as a beneficiary country, the United States initially considers factors such as the level of economic development of the country, including its per capita gross national product, and whether the country has attempted to reduce trade distorting investment practices.⁷⁵ In 1984, the GSP Renewal Act⁷⁶ expanded the criteria to include a worker rights provision.⁷⁷ The provision states: "[T]he President shall not designate any country a beneficiary developing country under this section . . . if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country."⁷⁸

The GSP statute defines "internationally recognized worker rights" using five ILO conventions⁷⁹ that establish: (1) freedom of association;⁸⁰ (2) the right to organize and bargain collectively;⁸¹ (3) a prohibition on the use of forced and compulsory labor;⁸² (4) a minimum age for the employment of children;⁸³

74. 19 U.S.C. §§ 2461-66 (1988). "A 'beneficiary developing country' means any country with respect to which there is in effect an Executive order or Presidential proclamation by the President of the United States designating such country as a beneficiary country" for the purposes of the GSP. 19 U.S.C. § 2462(a)(1).

75. For a complete list of the factors used to determine whether a country qualifies for GSP benefits, see 19 U.S.C. § 2462(c).

76. Pub. L. No. 98-573, tit. V, §§ 501-08, 98 Stat. 3018 (1984) (codified at U.S.C. §§ 2461-66 (1988)).

77. 19 U.S.C. § 2462(a)(4).

78. 19 U.S.C. § 2462(b)(7).

79. Congress relies on ILO-defined international worker rights even when it has not ratified such conventions. See 19 U.S.C. § 2462(a)(4).

80. ILO Convention No. 11, Right of Association Convention (1921), *Lists of Ratification by Convention and by Country*, *supra* note 14, at 19-20. The right of association has been defined as the right of workers and employers to establish and join organizations of their own choosing without previous authorization; to draw up their own constitutions and rules, elect their representatives, and formulate their programs; to join in confederations and affiliate with international organizations; and to be protected against dissolution or suspension by administrative authority. LYLE, *supra* note 22, at 20.

81. ILO Convention No. 98, Right to Organise and Collective Bargaining Convention (1949), *Lists of Ratification by Convention and by Country*, *supra* note 14, at 129-30. The right to organize and bargain collectively is, for example, the right of workers to be represented in labor negotiations and to be protected against interference with union activities. LYLE, *supra* note 22, at 22.

82. ILO Convention No. 105, Abolition of Forced Labour Convention (1957), *Lists of Ratification by Convention and by Country*, *supra* note 14, at

and (5) the right to a minimum wage and maximum work week.⁸⁴ GSP regulations require that a country respect these five worker rights in order to retain its GSP benefits.⁸⁵

In the event that a country is not according these worker rights, the GSP statute is equipped with an enforcement procedure. GSP regulations permit any person or party, on an annual basis, to "file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria."⁸⁶ In the annual GSP review process, labor and human rights groups may petition for the removal of benefits from countries with alleged worker rights violations.⁸⁷ Since worker rights were added to the GSP selection criteria in 1984, thirty-four countries have been reviewed⁸⁸ for their

140-41. Forced labor is defined as work exacted from any person under the threat of penalty and for which the person has not volunteered. LYLE, *supra* note 22, at 24.

83. ILO Convention No. 138, Minimum Age Convention (1973), *Lists of Ratification by Convention and by Country*, *supra* note 14, at 181-82.

84. ILO Convention No. 1, Hours of Work (Industry) Convention (1919), *id.* at 3; ILO Convention No. 131, Minimum Wage Fixing Convention (1970), *id.* at 173. Although the United States has signed the Abolition of Forced Labour Convention, the United States is not a signatory to the other four ILO conventions. Besides the Abolition of Forced Labour Convention, the United States is a signatory to 10 other ILO conventions: Officers' Competency Certificates Convention, 1936; Holidays with Pay (Sea) Convention, 1936; Shipowners' Liability (Sick and Injured Seamen) Convention, 1936; Hours of Work and Manning (Sea) Convention, 1936; Minimum Age (Sea) Convention (Revised), 1936; Certification of Able Seamen Convention, 1946; Final Articles Revision Convention, 1946; Tripartite Consultation (International Labour Standards) Convention, 1976; Merchant Shipping (Minimum Standards) Convention, 1976; Labour Statistics Convention, 1985. *Id.* at 268.

85. 19 U.S.C. § 2462(b)(7).

86. Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. § 2007.0(b) (1993).

87. The AFL-CIO, for example, filed seven worker rights petitions with the office of the United States Trade Representative on June 1, 1988. AFL-CIO, LABOR RIGHTS AND TRADE: A PROGRESS REPORT TO THE AFL-CIO COMMITTEE ON INTERNATIONAL AFFAIRS, February 20, 1989 (on file with the *Minnesota Journal of Global Trade*). In August 1988, the U.S. Administration decided that of these complaints, the complaints against Burma, Malaysia, Haiti, and Syria should be investigated to determine whether their GSP benefits should be withdrawn. *Id.* Petitions that were also accepted for review were against Israel from the American-Arab Anti-Discrimination Committee and Liberia from the Lawyers Committee for Human Rights. *Id.* Petitions rejected were those filed against El Salvador from Americas Watch and Guatemala from the International Labor Rights Education and Research Fund. *Id.*

88. The following countries have been reviewed under the GSP program as a result of allegations of labor violations: Bahrain, Bangladesh, Benin, Burma, Central African Republic, Chile, Costa Rica, Dominican Republic, El Salvador,

worker rights record.⁸⁹ As a result of these reviews, three countries' GSP benefits have been terminated.⁹⁰ Despite the serious ramifications of a negative review, the effectiveness of the GSP worker rights provision has been questioned.

B. WEAKNESSES OF THE GSP WORKER RIGHTS PROVISION

The GSP worker rights provision provides that as long as a country is "taking steps" toward affording internationally recognized rights to its workers, benefits will not be denied to that country.⁹¹ The provision has been criticized for being overly vague, susceptible to political manipulation and offensive to the GATT.

1. Vagueness and Political Manipulation

The vague nature of the GSP "taking steps" standard was addressed in a recent legal challenge to the GSP worker rights provision. In 1990, twenty-three plaintiffs, consisting of labor unions and human rights groups, filed suit against the U.S. government alleging failure to enforce the worker rights provision of the GSP statute.⁹² The complaint alleged that the U.S. government had not conducted any meaningful investigation since 1985 to assess whether countries designated prior to the amendment met the requisite worker rights standards.⁹³ The U.S. District Court for the District of Columbia dismissed the complaint

Fiji, Guatemala, Haiti, Indonesia, Israel, Liberia, Malawi, Malaysia, Maldives, Mauritania, Nepal, Nicaragua, Oman, Pakistan, Panama, Paraguay, Peru, Romania, South Korea, Sri Lanka, Sudan, Syria, Taiwan, Thailand, Turkey. GSP OFFICE, U.S. GENERALIZED SYSTEM OF PREFERENCES COUNTRY PRACTICES PETITIONS THROUGH MAY 1994 1-5 (July 5, 1994).

89. Panama's 1992 review provides an example of the GSP review process. GSP INFORMATION CENTER, WORKER RIGHTS REVIEW SUMMARY, CASE: 011-CP-92, PANAMA (July 1993). The Worker Rights Review Summary for Panama stated that the 1992 review was a continuation of a previous review to monitor the right to organize and collectively bargain, as well as monitor freedom of association in Panama. *Id.* Because the laws at issue were either repealed, amended or had lapsed, the GSP Subcommittee recommended that Panama be found to be "taking steps" to afford worker rights—thus maintaining Panama's GSP status. *Id.*

90. GSP OFFICE, *supra* note 88, at 3-4. Nicaragua, Romania and Liberia have been removed from the GSP program due to worker rights violations. *Id.*

91. 19 U.S.C. § 2462(b)(7).

92. Int'l Lab. Rights Educ. & Research Fund v. Bush, 752 F.Supp. 495 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992).

93. *Id.* at 496.

for failure to state a claim upon which relief could be granted.⁹⁴ The Court held that presidential GSP decisions could not be reviewed because of the "apparent total lack of standards" in the GSP provision and "the President's special and separate authority in the areas of foreign policy."⁹⁵

Arguably, the "taking steps" language of the GSP provision is purposely vague to give the executive branch a tool with which to negotiate solutions to worker rights violations.⁹⁶ The broad language may also be designed to provide the flexibility necessary in applying labor standards to the variety of social and economic conditions that exist worldwide.⁹⁷ However, the lack of judicial review⁹⁸ and vague standards in the GSP program have combined to insulate the executive branch in its enforcement of the worker rights provision.⁹⁹ Critics also suggest that this permits political considerations to heavily influence GSP determinations.

Commentators criticize the GSP worker rights provision because of the broad discretionary power¹⁰⁰ it delegates to the executive branch.¹⁰¹ They argue that the executive is free to include political considerations in the review and determination

94. The Court of Appeals affirmed the District Court's judgment. *Int'l Lab. Rights Educ. & Research Fund v. Bush*, 954 F.2d 745 (D.C. Cir. 1992) (affirming dismissal on ground of non-justiciability).

95. *Int'l Lab. Rights Educ. & Research Fund*, 752 F.Supp. at 497.

96. See 133 CONG. REC. H1499 (daily ed. Mar. 19, 1987) (statement of Rep. Pease).

97. See Kelleher, *supra* note 65, at 181.

98. *Int'l Lab. Rights Educ. & Research Fund*, 752 F.Supp. at 497.

99. See *id.*

100. Presidential discretion originates from two different aspects of the GSP. First, the President has discretion on whether to act on USTR findings of worker rights violations. 19 U.S.C. § 2462(a). Second, the "taking steps" language of the GSP statute is vague and allows for substantial leeway in interpretation. 19 U.S.C. § 2462(b)(7); see *supra* notes 96-99 and accompanying text.

101. The manner in which GSP's provisions are interpreted and administered determines the direction of the GSP program.

If left unchecked, [the] President . . . would be in a position to steer the program far away from its stated purpose of helping [less developed countries] become more competitive in international trade. In particular, those portions of the Renewal Act that allow the President to exchange GSP benefits for market access in recipient countries could turn the GSP into an instrument of economic blackmail.

Pease & Goold, *supra* note 20, at 360. For discussions criticizing the discretionary nature of the GSP, see PETER DORMAN, U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, WORKER RIGHTS AND U.S. TRADE POLICY (1989); Harlan Mandel, Note, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443 (1989); LYLE, *supra* note 22.

process which are unrelated to the improvement of working conditions.¹⁰² The problem with a politically motivated process, however, is not that the process indiscriminately punishes countries with worker rights violations; the problem is that it allows politically-favored countries to escape sanctions. Although petitions have been filed against El Salvador and Guatemala almost every year, Nicaragua, Romania, and Liberia¹⁰³ are the only countries with their benefits currently revoked under the worker rights provision.¹⁰⁴ One commentator observes that "although labor conditions in Nicaragua and Romania are undoubtedly objectionable, they are probably among the least repressive of the states against which petitions were filed."¹⁰⁵ In addition to allegations of political manipulation, there also have been criticisms that the unilateral use of the GSP worker rights provision offends the GATT.

2. Unilateral Worker Rights Provisions and Consistency with the GATT

Nondiscrimination and multilateralism are two of the fundamental principles governing the GATT.¹⁰⁶ Nondiscrimination

102. Mandel, *supra* note 101, at 470-71. Mandel writes that "an administration that is not committed to improvements in foreign worker rights . . . can simply deem cosmetic and ineffective policy changes by oppressive governments sufficient to qualify as 'taking steps' to afford worker rights." *Id.* at 471.

103. GSP OFFICE, *supra* note 88, at 3-4. Nicaragua, Romania, and Liberia are the only countries whose benefits have been revoked for their worker rights record. *Id.*

104. *Id.* In December 1987, the USTR also suspended Chile from the GSP program. *President Reagan Suspends Chile's GSP Status In Response To Its Worker Rights Violations*, 5 Int'l Trade Rep. (BNA) 10 (Jan. 6, 1988). The USTR's decision to delay suspension of Chile fit with U.S. policy towards Chile at the time. With regard to the U.S. policy towards Chile, Peter Dorman comments:

[I]t is clear that there was, at a minimum, ex post integration of policy. The United States government put pressure on Chile in a variety of ways following the coalescence of center and left parties behind a program for a return to democracy. These include[d] public statements by the President, the Secretary of State, and other prominent individuals, abstentions or even negative votes for credit assistance to Chile in the World Bank, financial assistance to opposition groups through the National Endowment for Democracy, and moves to distance the United States from Chile in diplomatic and military affairs.

DORMAN, *supra* note 101, at 14. For further discussion of the suspension of Chile from GSP status, see Paul H. Adams, Note, *Suspension of Generalized System of Preferences from Chile—The Proper Use of a Trade Provision?*, 23 GEO. WASH. J. INT'L L. & ECON. 501 (1989).

105. Mandel, *supra* note 101, at 464 (comparing Amnesty International reports for Nicaragua and Guatemala).

106. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 23 (1979).

requires that all contracting parties apply duties and similar charges on the importation of goods without regard to the country of origin of the goods.¹⁰⁷ Multilateralism requires that the conditions of trade be agreed upon by consensus.¹⁰⁸ Both of these ideals, however, are endangered by the unilateral use of worker rights provisions.

The principle of nondiscrimination is expressly provided for in the Most-Favoured-Nation (MFN) Clause of GATT Article I.¹⁰⁹ MFN requires that any benefit granted to one country be extended to all other countries immediately and unconditionally.

The GATT system was premised on the notion that . . . all countries stood to gain from increased trade. It intended that the rules of international trade would be built on a multilateral basis . . . [and] it assumed that the rules would be applied evenhandedly, without discrimination against, or favoritism for, a few. The faith was that the major economies would abide by the rules, [and] police them, . . . as might be required to keep the system together.¹¹⁰

In an effort to meet the special financial and trade needs of developing countries, the contracting parties to the GATT approved a waiver to GATT Article I in 1971.¹¹¹ Commonly known as the Enabling Clause, the waiver allows contracting parties to accord more favorable tariff treatment to products imported from developing countries.¹¹² The Enabling Clause is what "enables" the United States to provide preferential tariff treatment under the GSP program. The favorable treatment provided by the Enabling Clause is a significant deviation from the principle of nondiscrimination. Although it allows a nation to distinguish between developed and developing countries, the Enabling Clause does not appear to provide for any selectivity in according GSP privileges between developing countries.¹¹³

U.S. selectivity among developing countries as part of the GSP program thus has serious implications. The denial of GSP

107. *Id.*

108. *Id.*

109. The Most-Favoured-Nation Clause provision of GATT requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 15, art. I.

110. Zysman & Cohen, *Double or Nothing: Open Trade and Competitive Industry*, 61 FOREIGN AFF. 1113, 1129 (1983).

111. *Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, 26th Supp. BISD 203 (1980).

112. *Id.* para. 1.

113. *See id.*

benefits does not simply return a developing country to its status before the preference. In fact, the denied country is now at a disadvantage *vis-à-vis* other developing countries. Before the GSP benefits, all less developed countries were on a level playing field at least with regard to tariff levels. Now, however, the denied country incurs the standard U.S. tariff while its competitors are subject to a lower GSP tariff. Therefore, the implications of being denied GSP benefits for violations of worker rights provisions are equally as harmful as any other discriminatory trade restriction. More importantly, U.S. selectivity in the GSP program offends the GATT's fundamental principle of nondiscrimination.

In addition to nondiscriminatory treatment, multilateralism requires that the conditions and terms of trade reflect a consensus among trading partners.¹¹⁴ Multilateral agreements are preferable to unilateral actions for several reasons. First, unilateral worker rights provisions violate the rights of sovereign states to determine their internal policies.¹¹⁵ Second, multilateral agreements prevent a single nation from determining what worker rights are "fair" to provide.¹¹⁶ For example, Steve Charnovitz asks "what if Japan were to restrict imports from countries that do not provide lifetime employment."¹¹⁷ Labor standards should vary across countries to reflect various cultural and economic differences. A single nation dictating a single standard to apply to differing and complex situations may well lead to inappropriate standards.

Finally, unilateral action provides countries such as the United States wide discretion in awarding trade preferences. The political relationship between the United States and another country, for instance, is able to influence the future of that country's trade benefits.¹¹⁸ Again, the U.S. GSP program offends the GATT's fundamental principle of multilateralism. Multilateral agreements incorporating nondiscrimination principles are therefore more likely to achieve a less discretionary and more effective regulatory framework for international worker rights.

114. LOWENFELD, *supra* note 106, at 23.

115. Marquardt, *supra* note 62, at 25.

116. Charnovitz, *supra* note 19, at 75.

117. *Id.*

118. See *supra* notes 102-105 and accompanying text.

IV. THE LABOR SIDE AGREEMENT: A COOPERATIVE, MULTILATERAL APPROACH TO PROMOTING WORKER RIGHTS

The U.S. multilateral and unilateral attempts to link worker rights to trade benefits have had limited success. The multilateral attempts have not been effective due to the ILO's lack of a strong enforcement mechanism and the unwillingness of the GATT contracting parties to incorporate a worker rights provision. Moreover, U.S. unilateral action has been criticized as politically motivated and offensive to the fundamental principles of the GATT. The NAFTA Labor Side Agreement, however, represents a multilateral attempt that draws on certain benefits of each type of action while avoiding some of their more significant weaknesses.

A. THE LABOR SIDE AGREEMENT

The labor principles outlined in the Labor Side Agreement "indicate broad areas of concern where the Parties have developed, *each in its own way*, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces."¹¹⁹ Although the Labor Side Agreement mentions certain labor principles, such as the five ILO conventions discussed previously,¹²⁰ they are not meant to establish common minimum standards for each country's domestic law.¹²¹ Rather than unilaterally imposing such labor standards on other countries, the Labor Side Agreement concentrates on enforcing each country's existing domestic laws.

119. Labor Side Agreement, *supra* note 12, Annex 1 (emphasis added).

120. *Id.* For a description of the five internationally recognized worker rights, see *supra* notes 80-84. A controversial aspect of the Labor Side Agreement is that not all areas of domestic labor law are subject to dispute resolution; for example, the Labor Side Agreement does not mention the rights of association, organizing and bargaining in connection with its enforcement mechanism. See Labor Side Agreement, *supra* note 12, arts. 27, 49.

121. Labor Side Agreement, *supra* note 12, Annex 1. The agreement states:

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

Id. art. 2; see *Negotiator Says Labor Side Agreement to NAFTA Provides Effective Oversight*, 10 Intl. Trade Rep. (BNA) 1399 (Aug. 25, 1993).

The Labor Side Agreement exerts pressure on each government to explicitly outline their labor policies and enforce those standards.¹²² Article 3 of the Labor Side Agreement states that “[e]ach Party shall promote compliance with and effectively enforce its labor law through appropriate government action.”¹²³ Private action and procedural guarantees are also addressed in the Labor Side Agreement: “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative . . . [or] judicial . . . tribunals for the enforcement of the Party’s labor law.”¹²⁴

The Labor Side Agreement establishes a Commission for Labor Cooperation¹²⁵ which is comprised of a Ministerial Council and a Secretariat.¹²⁶ The Council is composed of labor ministers from the United States, Canada and Mexico.¹²⁷ It meets at least once a year to develop recommendations for and oversee the implementation of the Labor Side Agreement.¹²⁸ The Secretariat assists the Council in its functions and prepares reports on various issues related to the implementation and enforcement of labor laws.¹²⁹

The Commission is also assisted by the National Administrative Office (NAO) of each country.¹³⁰ The NAO serves as a “point of contact” with the governmental agencies of each Party, the other Parties’ NAOs, and the Secretariat.¹³¹ In addition, each NAO provides for the submission of “public communica-

122. Labor Side Agreement, *supra* note 12, art. 1(g).

123. *Id.* art. 3. With regard to appropriate government action, the Labor Side Agreement specifically mentions such issues as monitoring compliance and investigating suspected violations, and timely proceedings to seek appropriate sanctions or remedies for violations of its labor law. *Id.*

124. *Id.* art. 4. Article 5 of the Labor Side Agreement provides for procedural guarantees such as compliance with due process of law, impartial tribunal, timely decisions in writing, and proceedings open to the public “except where the administration of justice otherwise requires.” *Id.* art. 5.

125. This Commission does not negotiate standards in a formal sense. However, it “is a mechanism for learning more about improving labor standards, which could be a setting for improvements across the three countries.” *Negotiator Says Labor Side Agreement to NAFTA Provides Effective Oversight, supra* note 121.

126. Labor Side Agreement, *supra* note 12, art. 8.

127. *Id.* art. 9.

128. *Id.* arts. 9, 10.

129. *Id.* arts. 13(1), 14.

130. *Id.* art. 15.

131. *Id.* art. 16(1).

tions on labor law matters arising in the territory of another Party.”¹³²

The Labor Side Agreement emphasizes the use of consultations in resolving conflicts covered by the agreement.¹³³ However, if the matter is not resolved through consultations between NAOs or at the ministerial level, any Party may ask for an Evaluation Committee of Experts (ECE) to analyze the matter in a non-adversarial manner.¹³⁴ The ECE is normally comprised of three members which are independent of any Party.¹³⁵ After an ECE final report is presented to the Ministerial Council, any Party may request additional consultations with another Party.¹³⁶ A special session of the Council can be requested only after the disputing Parties fail to resolve the matter and an Arbitral Panel can only be convened by a two-thirds vote of the Council.¹³⁷

Dispute settlement panels¹³⁸ are to be invoked if a Party believes that “there has been a persistent pattern of failure” by another Party to effectively enforce their domestic labor standards.¹³⁹ Based on the submissions and arguments of the disputing Parties,¹⁴⁰ the Panel presents an initial report.¹⁴¹ A disputing Party can submit written comments on the initial report.¹⁴² After considering any such comments, the Panel

132. *Id.* art. 16(3).

133. *Id.* art. 20. Article 20 states: “The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation.” *Id.*

134. *Id.* art. 23.

135. *Id.* art. 24.

136. *Id.* art. 27.

137. *Id.* arts. 28, 29.

138. Where there are two disputing parties, the panel shall be comprised of five members. *Id.* art. 32. The disputing parties must agree on the chairperson of the panel and then each disputing party selects two panelists who are citizens of the other disputing party. *Id.* Where there are more than two disputing parties, the five member panel shall be comprised of an agreed-upon chairperson and four panelists. *Id.* The Party complained against selects two panelists, one of whom is a citizen of a complaining Party and the other from another complaining Party. *Id.* The complaining Parties shall select two panelists who are citizens of the Party complained against. *Id.* Panelists shall normally be selected from a roster that is maintained according to Article 30. *Id.* arts. 30, 32.

139. *Id.* art. 27(1).

140. A disputing party, or the panel itself, can also request information and expert advice. *Id.* art. 35.

141. *Id.* art. 36.

142. *Id.*

presents a final report to the disputing Parties.¹⁴³ If the Panel determines there has been a persistent pattern of failure by a Party to enforce certain labor standards,¹⁴⁴ the disputing Parties then agree on an action plan, which should conform to the recommendations of the Panel.¹⁴⁵ If the disputing Parties fail to agree on a plan or if there is a dispute as to whether the plan is being implemented, the Panel can be reconvened.¹⁴⁶ To force compliance, the Panel is equipped with the power to issue fines¹⁴⁷ and, ultimately, impose trade sanctions.¹⁴⁸ Punitive steps, however, are to be taken only as a last resort.¹⁴⁹

B. THE LABOR SIDE AGREEMENT AS A POSSIBLE MODEL FOR ADDRESSING WORKER RIGHTS

In the pursuit of addressing worker rights through trade agreements, the Labor Side Agreement contains several significant tools that make it a promising development. First, the Labor Side Agreement respects each Party's sovereignty because it does not impose any one country's labor standards on another. Instead, the Labor Side Agreement builds upon existing domestic labor standards.¹⁵⁰ This approach is preferable as it promotes gradual improvement of worker rights through cooperation and participation. Historically, developing countries, such as Mexico, have feared that multilateral action ignores their sovereignty by bringing excessive demands and swift enforcement.¹⁵¹ By using existing labor standards as a starting point, however, the Labor Side Agreement does not infringe on the sovereignty of other countries to the extent associated with past unilateral action.

143. *Id.* arts. 36, 37.

144. *See* text accompanying *supra* note 139.

145. Labor Side Agreement, *supra* note 12, art. 38.

146. *Id.* art. 39(1).

147. *Id.* art. 39(5)(b).

148. *Id.* art. 41(1). Canada is exempt from NAFTA trade sanctions for non-enforcement of its standards. In Canada, the federal court has powers to fine federal or provincial governments if a trinational panel determines that they have failed to enforce their own standards. *Id.* Annex 41A; Peter Morton & Kelly McParland, *Canada: Canada Wins Battle on Sanctions*, FIN. POST, Aug. 14, 1993, at 1.

149. *See supra* note 133 and accompanying text.

150. *See supra* notes 119-21 and accompanying text.

151. For a discussion of the fears of developing countries, see text accompanying *supra* notes 62-65.

Second, the Labor Side Agreement avoids the inevitable disagreement over what constitutes "fair" in labor standards.¹⁵² Due to the economic, sociological and cultural differences that exist worldwide, agreements have typically struggled with the definition of what constitutes an appropriate labor standard.¹⁵³ By requiring that each country only enforce its existing labor laws, the Labor Side Agreement entirely avoids the fairness debate.

Third, the Labor Side Agreement includes a more effective dispute settlement and enforcement process. Unlike the ILO, the Labor Side Agreement is not without enforcement power. Dispute settlement panels can be invoked and, if necessary, trade sanctions imposed.¹⁵⁴ Although political pressure may be a major factor in dispute settlement due to the limited number of parties to NAFTA, political discretion is minimized through the use of independent committees¹⁵⁵ or politically balanced panels.¹⁵⁶ Enforcement will ultimately be more effective because no government retains the politically manipulatable discretion associated with unilateral action when protecting worker rights.

Fourth, the Labor Side Agreement makes it easier for Parties to identify worker rights violations by providing greater access to information. The Labor Side Agreement requires the Secretariat of the Commission for Labor Cooperation to periodically prepare reports on each country's labor laws and labor market conditions.¹⁵⁷ In contrast, programs such as the GSP have been criticized due to the difficulty of accessing sufficient information needed to prepare the detailed complaints that the GSP regulations require. The AFL-CIO has noted that "[p]rivate [GSP] petitioners . . . may not have the resources, presence or access to target violators systematically."¹⁵⁸ Parties to NAFTA, however, will be able to address the alleged violations in greater detail.

Admittedly, NAFTA is a product of a unique situation. The Labor Side Agreement is an agreement between three neighbor-

152. See *supra* notes 116-17 and accompanying text.

153. See *supra* note 65 and accompanying text.

154. See *supra* notes 138-49 and accompanying text.

155. See *supra* notes 134-36 and accompanying text.

156. See *supra* note 138 and accompanying text.

157. Labor Side Agreement, *supra* note 12, art. 14.

158. AFL-CIO, *supra* note 87; see also Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79, 109 (1990).

ing countries with well developed labor laws already in place.¹⁵⁹ Thus, although the agreement provides an attractive alternative for multilateral agreements among countries with similarly developed labor laws, it may not be broadly applicable. Still, Mexico's participation in the Labor Side Agreement demonstrates that just as developed countries can adopt protective labor standards and agree to enforce those standards, so too can developing countries. Therefore, the provisions of the Labor Side Agreement arguably have broader application than the NAFTA situation.

V. CONCLUSION

The United States has consistently tried to link international trade to worker rights. U.S. attempts to act multilaterally within the GATT and ILO have met strong opposition from developing countries concerned about their sovereignty. U.S. unilateral action has also been heavily criticized and limited in its effectiveness. Unilateral attempts not only offend the GATT's spirit of multilateralism and nondiscrimination, but utilize overly vague provisions that permit political considerations to influence review and enforcement.

The Labor Side Agreement provides an alternative approach to addressing worker rights in trade agreements. The primary advantage of this approach is the Labor Side Agreement's concentration on enforcing existing domestic labor laws, rather than unilaterally imposing labor standards. As a result, the Labor Side Agreement avoids the inevitable disagreement over what constitutes "fair" labor standards. The Labor Side Agreement also improves dispute settlement and enforcement procedures by utilizing impartial and representative settlement

159. Ron Blackwell, associate director for research for a U.S.-based union, admits that the union "admires many aspects of labor laws in Mexico," but emphasizes that the laws need to be better enforced. *Economist Argues Free Trade with Mexico will Cause Adjustments in U.S. Workforce*, 8 Int'l Trade Rep. (BNA) 784 (May 22, 1991). For a discussion of labor law in Mexico, see Ann M. Bartow, Note, *Mexican Labor Law from Three Perspectives: the Constitution, the Trade Unions, and the Maquiladoras: The Rights of Workers in Mexico*, 11 COMP. LAB. L.J. 182 (1990). Canada's labor laws are less controversial than Mexico's. In Canada, employers have fewer private property protections with respect to union organizing, union certification is quick, and the Canadian government is willing to intervene in the collective bargaining process. *Canadian Lawyer Says Free Trade has Not Weakened Labor Standards*, Int'l Business and Trade Daily (BNA), Feb. 9, 1994, available in LEXIS, Intrad Library, BNAIBF file.

bodies as well as providing for the power to impose economic sanctions.

Although the Labor Side Agreement may be the product of a unique situation, its approach to labor standard development, dispute settlement, and enforcement should have a positive influence on future attempts to address worker rights in trade agreements.